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In The Supreme Court of the United States

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, ET AL.,

Petitioners,

v.

FORUM FOR ACADEMIC AND
INSTITUTIONAL RIGHTS, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL LESBIAN AND GAY LAW ASSOCIATION, LAW STUDENT ASSOCIATIONS, STATE BAR ASSOCIATIONS, AND THE NATIONAL GAY AND LESBIAN TASK FORCE IN SUPPORT OF RESPONDENTS

[A Full Listing Of The *Amici* On Inside Cover]

JONATHAN L. HAFETZ
Counsel of Record
LAWRENCE S. LUSTBERG
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Pennsylvania Plaza, 37th Fl.
New York, NY 10119
(212) 649-4700

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
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INTEREST OF *AMICI CURIAE*[1]

Amici are law student associations,[2] national and state bar associations, and advocacy groups. *Amici* are committed to eliminating discrimination on the basis of sexual orientation at law schools, in the legal profession, and in society at large. They each engage in numerous activities to raise public awareness about discrimination against lesbian, gay, bisexual, and transgender ("LGBT") people and to promote support for nondiscrimination laws and policies throughout the country. The First Amendment right of freedom of association is vital to *amici*'s effort to reach a national consensus in support of the principle of nondiscrimination and equal opportunity for all people regardless of sexual orientation.

Virtually every law school in the country has nondiscrimination policies that explicitly include sexual orientation. Those policies express values that are central to the mission of the schools and the welfare of their students and provide a vision of the kind of society in which *amici* want to learn, work, and live. At stake here is the First Amendment right of law schools to enforce those policies against the military, the nation's largest and arguably most influential employer, whose discriminatory policies clash directly with those of the law schools. *Amici* submit this brief to explain why the Solomon Amendment

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, or their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

[2] These associations appear only on behalf of their respective members, and they may not reflect the position of the law schools or universities with which they are affiliated.

infringes on the law schools' freedom of association and critically and impermissibly undermines the message those schools are conveying to their students and to the world outside their campuses.

SUMMARY OF ARGUMENT

Virtually every law school in the country refuses to assist any employer that discriminates on the basis of sexual orientation. The Solomon Amendment threatens those schools and their respective universities with the loss of potentially millions of dollars in federal funds for enforcing their nondiscrimination policies against the military. The government incorrectly argues that the Solomon Amendment does not implicate the law schools' First Amendment right of association. The law schools adopted and enforce their nondiscrimination policies to teach their ideals of justice to their students and to express their view that discrimination, including discrimination on the basis of sexual orientation, is fundamentally incompatible with the values of the legal profession. The Solomon Amendment significantly interferes with the schools' ability to express that message and, therefore, infringes on their associational rights. Further, it undermines a basic purpose of the freedom of association, which is to prevent the government from using its power to harass opposing groups to encourage conformity with its values.

The law schools' associational interest in adopting and enforcing their nondiscrimination policies is of tremendous value to them. Sexual orientation discrimination remains a significant problem in the legal profession. Law schools' nondiscrimination policies serve three expressive functions

whose importance this continued discrimination underscores: *first*, teaching the values that these law schools believe are essential to the improvement of the legal profession and society; *second*, creating an environment on law school campuses where all students feel equally welcome and able to participate in a meaningful way in the intellectual, social, and cultural life of the school; and *third*, taking a stand in the vigorous national debate on one of the most pressing social issues of the day by rising up in support of and providing an example of equal opportunity regardless of sexual orientation.

The attempt by law schools to maintain their nondiscrimination policies in the face of coercive measures like the Solomon Amendment is an important part of the national struggle against sexual orientation discrimination. The recent surge in state and local nondiscrimination laws illustrates the vigorous nature of the debate over sexual orientation in the United States right now, and makes the decision by law schools to weigh in on that debate a very significant one. Moreover, the military is not just another employer, as the government suggests, but is the nation's largest employer and has tremendous influence on American society. The law schools' attempt to express their message through the even-handed enforcement of their nondiscrimination policies against the military illustrates the importance of the First Amendment right of association and the protections it provides against attempts by the government to compel conformity with its values.

I. THE SOLOMON AMENDMENT INFRINGES ON LAW SCHOOLS' RIGHT OF FREEDOM OF ASSOCIATION.

Nearly every law school in the United States has adopted policies that deny employers access to their career service facilities unless those employers certify that they do not discriminate on the basis of sexual orientation. It is the considered judgment of these schools that it is extremely important to inculcate in their students the principle of nondiscrimination; to maintain an environment in which all students feel that they have equal opportunities to learn, prepare for, and join the legal profession; and to make their voices heard in the broader movement against discrimination in the legal profession and in society at large. The Solomon Amendment, however, threatens those law schools and their universities with the loss of federal funds for applying their nondiscrimination policies to the military, which openly discriminates on the basis of sexual orientation. *See* 10 U.S.C. § 654(b). Moreover, in its current form, the Solomon Amendment demands not merely access to law school campuses and students, but access "that is *at least equal* in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1) (emphasis added). As a result, law schools must provide the military with a range of affirmative assistance, including disseminating the military's recruiting brochures, making appointments with students, and reserving spots for the military in their otherwise private forums for the exchange of information, or lose potentially millions of dollars of funding needed for important university endeavors like medical research.

The government's claim that the Solomon Amendment only regulates conduct and, therefore, "does not implicate the First Amendment right to associate," Brief for the Petitioners at 23, fundamentally misconstrues the freedom of association and the purpose that right serves. Control over membership is not the end of freedom of association, but merely a means of enabling associations to effectively express their respective points of view. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). "Government actions that . . . unconstitutionally burden this freedom may take many forms." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). Interference with an association's internal composition is one such form, but certainly not the only one. *Id.* As history demonstrates – and as *amici* are well aware from their own experiences – the state may infringe on an association's freedom in a variety of other ways. *See, e.g., NAACP v. Button*, 371 U.S. 415, 437-38 (1963) (engaging in litigation); *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 720-26 (1996) (choosing political alliances); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (citing cases). Here, the law schools' freedom of association has been infringed to no less degree simply because the government has tampered with their nondiscrimination policies rather than their membership

Law schools seek to develop future lawyers who "can profoundly change our society, its mores and values," Joint Appendix ("J.A.") 54, and who will seek to further their visions of justice in society, J.A. 228, 230. Almost every law school in the country has adopted nondiscrimination policies to teach its ideals of justice, to create an environment that is inclusive and conducive to learning for all students, and to weigh in on the side of nondiscrimination

in the broader struggle for equal opportunity in the legal profession and society in general. *See infra* at 22-24. The law schools communicate their nondiscrimination policies through a series of activities connected to recruiting, from distributing, posting, and printing literature to making introductions and sponsoring forums for the exchange of information. Those policies express a message that is very important not only to the law schools but also to *amici*, and they fall squarely "within [the] ambit" of expression protected by the First Amendment. *Dale*, 530 U.S. at 648. The Solomon Amendment directly interferes with these core associational activities by enabling the military to insert itself directly into the lives of the law schools, directing the schools' recruiting activities in a critical respect, and requiring the schools to affirmatively assist the military in promoting its discriminatory message. This interference plainly infringes on the law schools' right to freedom of association.

The government also asserts that the law schools are not being forced to communicate a message contrary to their beliefs. Brief for the Petitioners at 20-22. But the critical issue is not, as the government maintains, whether students or other employers will perceive the law schools as endorsing the military's discriminatory policies; rather, it is whether the schools' forced association with the military conflicts with their basic values and ideals. *Dale*, 530 U.S. at 655; *Roberts*, 468 U.S. at 622. The law schools' policies express their view that discrimination on the basis of sexual orientation is morally wrong and fundamentally incompatible with the principles of the legal profession. Those policies teach students that it is wrong to discriminate and equally wrong to enable those who discriminate

to continue doing so. Yet, the Solomon Amendment requires the law schools to assist the military, an employer that openly discriminates on the basis of sexual orientation. The Amendment thus directly conflicts with the law schools' basic values and ideals, and squarely implicates their right to freedom of association.

Moreover, as *amici* law student associations well know, students will in fact perceive their schools as endorsing the military's discriminatory policies, particularly if schools provide the type of affirmative assistance demanded under the Solomon Amendment. Law schools not only prepare students for the legal profession but also help them secure legal employment. In adopting and enforcing their nondiscrimination policies against all employers, law schools communicate their commitment to their students and their belief about their students' place in the legal profession. But the message that law students receive when their schools distribute the military's recruiting brochures and post its bulletins on their campuses is that the schools are not committed to the principle of nondiscrimination in practice and that lesbian, gay, and bisexual students are expendable and unequal members of the law school community. Brief for the Respondents at 14. This has a chilling effect on discourse and learning in law schools, making some LGBT students feel like second-class citizens and discouraging them from speaking out. *Id.* As the record shows, *see, e.g.*, J.A. 17, and as *amici* can further attest, when law schools affirmatively assist the military with its recruiting they send a potent – and demoralizing – message to law students, particularly LGBT students, about the schools' values. This critically undermines the law schools' ability to convey their belief

in equal opportunity to their students and to create an inclusive community on their campuses.

The government further contends that because a function of law schools is "to expose students to a wide range of views," the Solomon Amendment "does not force [the schools] to take a position on an issue that is inconsistent with [their] beliefs." Brief for the Petitioners at 20. But it is for the law schools, not the government, to determine what values they are trying to express and whether the Solomon Amendment impairs that expression. *See Dale*, 530 U.S. at 653 (deferring to "an association's assertions regarding the nature of its expression" and to "an association's view of what would impair [that] expression"); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574-75 (1995) (right of private speakers to shape content of their message). Law schools may expose students to diverse views *and* take an unequivocal institutional stand on issues that they consider important to the welfare of their students, the legal profession, and society at large. Nearly every law school in the country has determined that discrimination on the basis of sexual orientation is wrong and that assisting those who discriminate undermines their ability to teach this message to their students. That determination is entitled to deference. *See Dale*, 530 U.S. at 651 ("[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent.").

Indeed, this case presents a much greater infringement on associational rights than did *Dale*. In *Dale*, the Boy Scouts' mission statement did not even mention sexual orientation, and merely called for scouts to be "morally

straight" and "clean." 530 U.S. at 649-50. Yet, the Court concluded that the Boy Scouts had a First Amendment right to exclude a scoutmaster who happened to be gay based merely on the effect his "presence" would have on the organization's ability to express its message. *Id.* at 653. Additionally, in *Hurley*, the organizers of a Saint Patrick's Day Parade had no written criteria for admission, 515 U.S. at 562, had no "particularized message," *id.* at 569 (citation omitted), and expressed their views through a public celebration full of people in costumes and marching bands rather than through any declarative statement of deep-seated moral values, *id.* at 568-70. Yet, the Court found that the parade had an expressive purpose and that requiring its organizers to admit a contingent expressing a message not of the organizers' choosing violated the First Amendment. *Id.* at 566, 568-70.

Here, the law schools have adopted written policies expressly prohibiting discrimination based on sexual orientation. Their message could not be clearer. As a typical nondiscrimination policy reads: "[The] School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this school *shall not* be available to those employers that discriminate on the grounds of . . . sexual orientation. . . ." J.A. 33-34 (emphasis added and citation omitted). If the unambiguous and unparticularized messages implicated in *Dale* and *Hurley* held expressive value, then so too must the clear commitment to nondiscrimination enumerated in the policies of nearly every law school in the country. It would be very troubling indeed, *amici* submit, if some organizations were free to discriminate based on sexual orientation while other institutions that express a

message of nondiscrimination were forced to assist those who openly discriminate on that basis.

Only by giving short-shrift to the freedom of association can the government ignore the important role this First Amendment right plays in preserving the robust debate over norms and values that is vital to democracy. Freedom of association is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). An association provides "the medium through which its individual members seek to make more effective the expression of their own views," *NAACP v. Alabama*, 357 U.S. at 459, and thereby enhances "effective advocacy of both public and private points of view, particularly controversial ones," *id.* at 460. Freedom of association also "makes an independent contribution to the First Amendment's project of encouraging robust debate about political issues and so has First Amendment protections apart from those of its members." William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2338 (2002). Indeed, in this country, a robust associational life has traditionally protected against government oppression, 1 Alexis de Tocqueville, *Democracy in America* 194-95 (Renaissance ed., Colonial Press 1900) (1835); Laurence H. Tribe, *American Constitutional Law* 1313 (2d ed. 1988), and served as an inculcator of democratic values, 2 de Tocqueville, *supra*, at 117. Like the freedom of assembly, the freedom of association is critical "in order to maintain the opportunity for free political discussion, to the end that the government may be responsive to the will of the people and that changes, if desired, may be obtained." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

Associations must therefore be protected from government measures that seek to suppress public discussion or compel conformity with the government's values. *See, e.g.*, *Dale*, 530 U.S. at 647-48 ("[Freedom of association] is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."); *Roberts*, 468 U.S. at 622 ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."). During the African-American civil rights movement, for example, state and local governments in the South sought to undermine the advocacy of the NAACP. The governments in that region of the country disagreed with the values that the association espoused – racial equality and integration – and tried to curtail the association's activities and the larger public dialogue it had helped to spark. There, the harassment commonly took the form of forced disclosure of the NAACP's membership lists, which subjected the association's members to reprisals and undermined its ability to pursue its goals. In fact, compulsory disclosure caused membership to decline throughout the South and threatened the NAACP's very survival in places. *See* Mark Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1931-1961*, at 290-91 (1994). This Court properly rejected the Southern states' attempts, recognizing the dangers that government suppression of freedom of association poses to a democratic society. *See, e.g.*, *Gibson v. Florida Legislative Investigating Comm.*, 372 U.S. 539, 558 (1963) (invalidating contempt judgment issued by state's investigating legislative committee); *NAACP v. Alabama*, 357 U.S. at 466 (invalidating state

court contempt order for association's refusal to disclose membership lists).

Cases involving attempts to prohibit membership in or association with the Communist Party during the Cold War teach a similar lesson. The Court did not challenge Congress's findings that the Party was engaged in illegal activity, including terrorism and espionage, with the goal of overthrowing the United States by force and violence; nor did the Court ever question that protecting the nation against such threats was a compelling interest. David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 Sup. Ct. Rev. 203, 218 (1999). Nevertheless, the Court consistently rejected attempts to penalize or chill lawful First Amendment activity, condemning a variety of anti-Communist measures which penalized mere association. *See, e.g., United States v. Robel*, 389 U.S. 258, 262 (1967) (invalidating ban on Communist Party members working in defense facilities); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967) (invalidating statute barring employment in state university system to Communist Party members); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (invalidating oath requiring state employees not to join Communist Party); *Scales v. United States*, 367 U.S. 203, 221-22 (1961) (construing Smith Act, which barred membership in organization advocating violent overthrow of government, to require showing of "specific intent" to further group's illegal ends). The Court recognized the "real danger" to freedom of expression in prohibiting all association with the Communist Party when some of the Party's aims were not illegal but simply unpopular or controversial. *Scales*, 367 U.S. at 229; *see also Elfbrandt*, 384 U.S. at 16-17; *Brown v. Socialist Workers '74 Campaign Committee*, 459

U.S. 87, 101-02 (1982) (prohibiting application of campaign finance disclosure provision to minor political party where it could subject party's members to threats or reprisals). In a climate of intense debate, measures curtailing freedom of association, even in pursuit of legitimate and compelling ends like national security, can "stifl[e]" public discussion. *Keyishian*, 385 U.S. at 607. The Court thus construed anti-communist provisions narrowly to preserve associational freedom, *Scales*, 367 U.S. at 229, and prevented the state from "cast[ing] its net across a broad range of associational activities," *Robel*, 389 U.S. at 265-66.

The subjects of public debate change over time, and the tactics used by governments to compel conformity with their values take a variety of forms. Most recently, controversies have involved issues surrounding discrimination based on gender or sexual orientation. *See, e.g.*, *Dale*, 530 U.S. at 643-44 (excluding gay man from membership in Boy Scouts); *Hurley*, 515 U.S. at 561, 570 (preventing gay, lesbian, and bisexual organization from marching in Saint Patrick's Day parade); *Roberts*, 468 U.S. at 612 (barring women from full membership in local civic organization). The Court has emphasized that the First Amendment prevents the state from dictating or influencing the outcome of these controversies by restricting an association's expression of its values or beliefs. *See, e.g.*, *Dale*, 530 U.S. at 647-48; *Roberts*, 468 U.S. at 622;[3] *see also Hurley*, 515

[3] In *Roberts*, the Court upheld a state public accommodations law forbidding discrimination on the basis of sex against a First Amendment challenge by the United States Jaycees, which had refused to admit women. 468 U.S. at 612. There, however, the membership integration did not go to the core expressive purpose of the Jaycees or materially affect the group's ability to express its ideas, and, hence, the

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U.S. at 575 (choice of speaker to propound or not to propound a given point of view "is presumed to lie beyond the government's power to control").

Here, law schools took a stand on one of the most hotly-contested issues in society today. The Solomon Amendment then sought to "send a message over the wall of the ivory tower of higher education" that these schools' "starry-eyed idealism comes with a price." 140 Cong. Rec. 11,441 (1994) (Rep. Pombo). When law schools refused to buckle under the pressure, and in order to compel compliance, the law was amended to make that price more painful. *See* Brief for the Respondents at 11 (describing the escalating sanctions). The Solomon Amendment now threatens law schools and their universities with the loss of millions of dollars in federal funds if they do not give military recruiters exactly the same access to their students and campuses as nondiscriminating employers enjoy. That is impermissible. The First Amendment ensures that in a democracy the government cannot settle

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right of association was weak. *Id.* at 626 (noting Jaycees failed to demonstrate "any serious burdens on the male members' freedom of expressive association"). The same was true in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), which also involved the exclusion of women from a private club. *See* 481 U.S. at 548; *see also Dale*, 530 U.S. at 657 (enforcement of public accommodations statutes "would not materially interfere with the ideas that the organization[s] sought to express" in *Roberts* and *Duarte*). In addition, whatever infringement was accomplished in *Roberts* and *Duarte* was justified by the state's constitutionally recognized interest in combating sex discrimination. *See, e.g., Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 728-30 (2003).

public debate by bullying its opponents, regardless of what side of the political spectrum those opponents are on.

The government argues that it is not restricting speech or freedom of association because law schools can criticize the Solomon Amendment or at least offer disclaimers about why they are helping the military to violate their own nondiscrimination policies. The evidence shows that this is false, and that the Solomon Amendment undermines the law schools' ability to express their message. *See* Brief for the Respondents at 14. But, even were that not so, an association must remain free to express its message of protest in the manner it chooses and, accordingly, is not limited to public pronouncements if the association feels that those pronouncements will not effectively convey its message. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (protecting right of civil rights group to protest against discrimination by boycotting businesses that discriminate).

The Solomon Amendment, moreover, appears to permit suppression even of the kind of expressive activity that the government claims the Amendment preserves. As written, the Solomon Amendment mandates that law schools provide access to their campuses and students that is equal "in *quality* and scope" to that provided to other employers. 10 U.S.C. § 983(b)(1) (emphasis added). What if law student organizations, such as *amici*, engaged in a demonstration which the military believed hindered its access to a law school campus or to law school students, or made that access in any way inferior "in quality" to the access enjoyed by nondiscriminating employers? Under the Solomon Amendment, the government could threaten to withdraw millions of dollars in federal funds from the university unless the law school cracked down on the

students and did so successfully. This scenario is not far-fetched. In arguing for the present equal access provision, a Department of Defense official cited a law school's failure to stifle student protest as a "particularly egregious" example of denying the military access to students. H.R. Rep. No. 108-443, pt. 1, at 7; *see also id.* (complaining that "military recruiters and prospective recruits have been forced to endure verbal abuse and harassment"). Indeed, there is no limit to the range of associational activities that could be restricted in the name of "*uninhibited* recruitment programs." *Id.* at 4 (conclusion of Armed Service Committee report on 2004 amendments to Solomon Amendment) (emphasis added).

In short, the First Amendment protects a broad range of expressive activities by associations. This Court has given meaning to this protection by making clear that associations are in the best position to determine the content of their expression and the type of government restrictions that would impair it. The right of freedom of association is equally robust regardless of whether groups are "progressive" or "conservative," or whether the government disagrees with their message. Indeed, coercive measures like the Solomon Amendment represent precisely the kind of attempt to compel conformity with the government's values that the freedom of association guards against. It is essential, then, that the law schools remain free to express their ideals through the even-handed enforcement of their nondiscrimination policies.

II. ONGOING DISCRIMINATION IN THE LEGAL PROFESSION DEMONSTRATES THE VALUE OF THE LAW SCHOOLS' ASSOCIATIONAL INTEREST IN THEIR NONDISCRIMINATION POLICIES.

Law schools historically have resisted discrimination based on characteristics unrelated to merit, and have considered that resistance part of their educational mission. In 1950, for example, the Association of American Law Schools adopted a policy opposing segregation or discrimination in legal education on racial grounds, declaring that "it was the professional duty of all member schools to abolish any such practices at the earliest practicable time." Michael H. Cardozo, *Racial Discrimination in Legal Education, 1950 to 1963*, 43 J. Legal Educ. 79, 79 (1993) (citation and internal quotation marks omitted). Since then, law schools have continued to adopt policies opposing and prohibiting discrimination on other grounds. Brief of *Amicus Curiae* Association of American Law Schools in Support of Appellants, at 5, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (inclusion of gender). The law schools' inclusion of sexual orientation in their nondiscrimination policies thus reflects their longstanding commitment to the principle of equal opportunity for all people.

The law schools' associational interest in adopting and enforcing their nondiscrimination policies has tremendous value to them. Contrary to the assertion by members of Congress that law schools are engaging in ivory tower elitism, *see, e.g.*, 141 Cong. Rec. H5963 (1995) (Rep. Solomon), sexual orientation discrimination remains a real problem in the legal profession. Law schools' nondiscrimination policies serve several important purposes: *first*, teaching the values these law schools believe are essential

to the improvement of the legal profession and society; *second*, creating an environment on law school campuses where all students feel equally welcome and able to participate in a meaningful way in the intellectual, social, and cultural life of the school; and *third*, taking a stand in the vigorous national debate on one of the most pressing social issues of the day by rising up in support of and providing an example of equal opportunity for all people regardless of sexual orientation. The schools' nondiscrimination policies, which accomplish each of these ends, clearly constitute expressive activity and are entitled to First Amendment protection.

Discrimination on the basis of sexual orientation has a long history in the legal profession. Until the mid-1980s, for example, gays and lesbians faced exclusion from the bar on the basis of sexual orientation when bar associations would use the screenings of applicants for moral character to discourage gays and lesbians from entering the legal profession. William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 Hastings L.J. 1101, 1110 (1997). Also, because legal environments were often oppressive or even dangerous places to form LGBT law student, bar, and civil rights groups, these groups did not begin to flourish on campuses until the 1970s. *Id.* at 1109-10.

While the number of people openly supporting discrimination based on sexual orientation has decreased over the past three decades, anti-gay bias remains a significant problem throughout the country. Numerous studies of the legal profession in particular have found significant, if not pervasive, instances of discriminatory conduct towards and attitudes about gays and lesbians. These studies demonstrate that LGBT law students

continue to struggle in deciding whether and how to be open about their sexual orientation in searching for jobs, that entire job categories remain unavailable to openly LGBT attorneys, and that LGBT attorneys still regularly confront discriminatory treatment throughout the legal profession. *See generally* Rubenstein, *In Communities Begin Responsibilities*, *supra*, at 1115-16.

A Los Angeles report, for example, indicates that the number of lawyers affected by anti-gay bias "is substantial." The Los Angeles County B. Ass'n Rep. on Sexual Orientation Bias (1995) ("Los Angeles Report"), *reprinted in* 4 S. Cal. Rev. L. & Women's Stud. 305, 305-06 (1995). This discrimination is "widespread and manifests itself in all stages and aspects of attorney employment," including "recruitment and hiring; general work environments; work assignments; evaluation; promotion and advancement; compensation; and retention and career path." *Id.* at 310-11. The report found that over 38 percent of heterosexual attorneys, almost 68 percent of lesbian attorneys, and over 58 percent of gay male attorneys either witnessed or experienced anti-gay discrimination. *Id.* at 310-11.

An Arizona report concluded that discriminatory conduct takes place in courtrooms, large firms, and law schools, and that "lesbians and gay men are at a substantial disadvantage in all areas of contact with the justice system in [the State]." Final Report of State Bar of Arizona Task Force on Gay and Lesbian Issues, ("Arizona Report"), 37 AZ Att'y 36, 37 (2000). It found that "[t]he percentage of discriminatory incidents observed by gay men and lesbians who work inside our legal system is double that observed" by members of the general public, and that "the more contact a gay man or lesbian has with the justice system, the more likely he or she is to observe incidents of

discriminatory conduct." *Id.* at 38. Similarly, a District of Columbia survey reported that over one in four LGBT attorneys had witnessed or heard of a client, supervising lawyer, junior attorney, or non-lawyer staffer who declined to work with a lawyer because the lawyer was gay or thought to be gay. D.C. B. Sexual Orientation Task Force Rep., at Lawyer Survey Table 21 (2000) ("D.C. Report"), *available at* http://www.dcbar.org/inside_the_bar/structure/reports/task_force/index.cfm.

Such discrimination significantly affects the lives of gay and lesbian lawyers. LGBT attorneys continue to be denied employment and health insurance benefits for their partners, and often are not provided with family leave to care for a sick domestic partner or child of a domestic partner, or to provide care when a partner adopts or gives birth to a child. D.C. Report, *supra*, Lawyer Survey Table 17; Employer Survey Table H. They are also far less likely to become partners than heterosexual attorneys and are subjected to less favorable advancement criteria. Los Angeles Report, *supra*, at 322.

Anti-gay discrimination also places LGBT workers in the uncomfortable position of having to choose between being open about their sexual orientation – and risking discriminatory treatment or attitudes – or hiding their identity to advance and succeed within their respective organizations. *See, e.g.*, William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 UCLA Women's L.J. 379, 393-94 (1998) (describing fear among gay and lesbian attorneys of being open about their sexuality in the same manner as heterosexual attorneys). For example, almost half of the LGBT respondents to a District of Columbia survey concealed their sexual orientation, and over 50

percent thought that it would be detrimental to be open about their sexual orientation in the legal workplace. D.C. Report, *supra*, Lawyer Survey Table 9, available at http://www.dcbar.org/inside_the_bar/structure/reports/task_force/index.cfm; *see also* Los Angeles Report, *supra*, at 312 (noting that many gay attorneys choose to conceal their sexual orientation because of "overt hostility and blatant discrimination"). Indeed, hiding in the closet[4] is often considered "the most certain and, in some instances, the only path to job security." Los Angeles Report, *supra*, at 337.

Consequently, LGBT attorneys often refrain from discussing their private lives in the same manner as is acceptable for the non-homosexual majority. *See generally* D.C. Report, *supra*, Section II.C.1, *available at* http://www.dcbar.org/inside_the_bar/structure/reports/task_force/II_C_1.cfm. As a practical matter, many LGBT attorneys are thus unable to display family photographs, take leave for a sick partner, discuss their loved ones openly, or even reveal the neighborhood they live in – things most heterosexual attorneys take for granted. Instead, LGBT attorneys often feel invisible. They are presumed to be heterosexual, and then are put in the position of revealing their sexual orientation as a consequence of mentioning details of their everyday lives. *Id.*, Section II.C.4, *available at* http://www.dcbar.org/inside_the_bar/structure/reports/task_force/II_C_4.cfm. At the same time, by remaining closeted, not bringing partners to events, and not discussing their private lives, LGBT attorneys can be perceived as aloof and distant, and, as a result, are less likely to be promoted. E.J. Graff, *Welcoming the Invisible Bar: Lesbian and Gay Attorneys,*

[4] "Hiding in the closet" is a colloquial phrase for concealing one's sexual orientation.

Diversity and the Bar (June 2002), *available at* http://www.mccacom/site/data/magazine/coverstory/invisiblebar0602.shtml.

The fact that many heterosexual attorneys are unaware of anti-gay bias further underscores why law schools have concluded that it is so important to raise awareness about and address anti-LGBT discrimination in the legal profession. For example, one report found that approximately 25 percent of heterosexual attorneys surveyed said they did not know of any LGBT attorneys in their workplace, as compared to 7 percent of lesbian and gay respondents. D.C. Report, *supra*, Lawyer Survey Table 11, *available at* http://www.dcbar.org/inside_the_bar/structure/reports/task_force/index.cfm. And, while 75 percent of heterosexual respondents to that study did not believe that being openly gay would harm an attorney's career, over 50 percent of gay or lesbian respondents thought it would. *Id.*, Lawyer Survey Table 9, 15.

The evidence of continued discrimination in the legal profession underscores why law schools' nondiscrimination policies are a valuable expressive activity to those schools. Law schools have at least three distinct interests in enforcing their nondiscrimination policies in an even-handed way, all heavily imbued with expression. *First*, in addition to teaching skills, law schools also teach students about their ideals of justice and seek to instill in them the values they believe every member of the legal profession should have. The overriding message of this lesson is that it is wrong to discriminate and equally wrong to assist those who do so. It is the law schools' considered judgment that adopting and enforcing nondiscrimination policies is the best way to communicate that lesson to their students. What message, then, does a law school send to those students when it provides its full assistance, services, and

resources to an employer that expressly discriminates based on arbitrary criteria, like sexual orientation, which bear no relationship to merit? Imagine the message it would send to a law school's African-American students if the school distributed brochures and made appointments for an employer that openly discriminated on the basis of race. As every student knows, a teacher, more than anyone else, must practice what he preaches to be taken seriously. When a law school fails to enforce its nondiscrimination policies even-handedly, the school's message is diminished and distorted, breeding disrespect for the school and contempt for the very lesson it wants to teach.

Second, law schools seek to create an inclusive environment on their campuses in which all students feel equally welcome and able to participate in the intellectual, social, and cultural life of the school. That goal is expressed through a school's nondiscrimination policies. The evidence of discrimination described above underscores why law schools felt the need to include sexual orientation in their policies: law schools recognize that when a student feels like a second-class citizen it prevents him or her from having a meaningful educational experience, especially when the student believes the discrimination results from race, gender, religion, national origin, or sexual orientation – none of which has anything to do with the student's inherent ability to succeed at law school and in the legal profession. But that is precisely what happens to LGBT students when law schools fail to apply their stated nondiscrimination policies to an employer that openly discriminates based on sexual orientation.

Third, by adopting and enforcing nondiscrimination policies, law schools express their ideals and values not only on their own campuses but in society at large. Through

their nondiscrimination policies, law schools have taken a stand in the debate over sexual orientation discrimination that is occurring at kitchen tables and in voting booths in towns and cities across America. Those policies, then, are not ivory tower elitism or academic "nonsense," as some members of Congress have asserted, *see, e.g.*, 141 Cong. Rec. H5963 (1995) (Rep. Solomon), but, rather, a way for law schools to make their voices heard in one of the most important civil rights battles of this generation. This expressive activity is protected by the First Amendment.

III. THE RAPID SURGE IN NONDISCRIMINATION LAWS AND THE MILITARY'S INFLUENCE ON AMERICAN SOCIETY UNDERSCORE THE SIGNIFICANCE OF LAW SCHOOLS' CONSTITUTIONALLY PROTECTED DECISION TO TAKE A STAND IN THE ONGOING DEBATE OVER SEXUAL ORIENTATION DISCRIMINATION.

The attempt by law schools to maintain their nondiscrimination policies in the face of heavy-handed measures like the Solomon Amendment is an important part of the national struggle against sexual orientation discrimination. Over the past three decades, states, counties, and cities have pioneered the passage of laws mandating equal treatment of LGBT people, and they have done so "at an ever accelerating rate." *See* Kara S. Suffredini, *What a Difference a Decade Makes: Lesbian, Gay, Bisexual and Transgender Nondiscrimination Law and Policy in the United States*, 13 The Diversity Factor (No.1) (2005). Presently, sixteen states and the District of Columbia have laws prohibiting discrimination based on sexual orientation in employment as well as in other areas like housing,

public accommodations, and education.[5] Over half of these laws were passed in the last ten years. *See* "State

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[5] *See* Cal. Gov't Code §§ 12926(m), 12926(q), and Cal. Penal Code § 422.56(h) (definitions); Cal. Gov't Code §§ 12920, 12940 (employment and housing) (Deering 2005); Conn. Gen. Stat. Ann. §§ 46A-81a (definition); 46a-81c (employment); 46a-81d (public accommodations); 46a-81e (housing); 46a-81f (credit) (2004); D.C. Code §§ 2-1401.02(28) (definition); 2-1402.11 (employment); 2-1402.31 (public accommodations); 2-1402.41 (education); 2-1402.71 (motor vehicle insurance) (2005); Haw. Rev. Stat. §§ 368-1 (policy); 378-1 (definition); 378-2 (employment); 515-2, 515-3, 515-5, 515-6, 515-7 (housing) (2004); 775 Ill. Comp. Stat. §§ 5/1-102 (employment, housing, credit, and public accommodations); 5/1-103(O-1) (definition); 5/5-101 (public accommodations definition) (2005); 2005 Me. Legis. Serv. Ch. 10 amendments to 5 Me. Rev. Stat. Ann. tit. 5, §§ 4552 (policy); 4553 (definitions); 4571-72 (employment); 4581-83 (housing); 4591-92 (public accommodations); 4595-98 (credit); 4601-04 (education) (West 2005); Md. Code Ann., art. 49B, §§ 5 (public accommodations); 15(j) (definition); 16 (employment); 20-22 (housing) (2005); Mass. Gen. Laws Ann. ch. 151B §§ 1 (definitions); 3A (employment) (2005); Minn. Stat. §§ 363A.02 (employment, housing, public accommodations, education, public services); 363A.03 (definitions); 363A.08 (labor organizations, employers, employment agencies); 363A.16 (credit) (2004); Nev. Rev. Stat. §§ 281.370 (policy and definitions); 613.330, 613.340 (employment) (2004); N.H. Rev. Stat. Ann. §§ 21:49 (definitions); 354-A:1 (policy); 354-A:2 XIV-a (definitions); 354-A:6 (employment); 354-A:8-10 (housing); 354-A:16-17 (public accommodations) (2004); N.J. Stat. Ann. §§ 10:5-4 (policy); 10:5-5 (definitions); 10:5-12 (employment, public accommodation, housing, credit) (2005); N.M. Stat. Ann. §§ 28-1-2(P) (definition); 28-1-7(A) (employment); 28-1-7(B) (labor organizations); 28-1-7(C) (training programs); 28-1-7(F) (public accommodations); 28-1-7(G) (housing); 28-1-7(H) (credit) (Michie 2005); N.Y. Exec. Law §§ 296(1) (employment), 296(2) (public accommodations), 296(2-a), 296(3-b), 296(5)(a) (housing); 296(4) (education); 296-a (credit) (2005); R.I. Gen. Laws §§ 28-5-2, 28-5-3, 28-5-6(15), 28-5-7 (employment); 34-37-4 (housing); 34-37-4.3 (credit); 11-24-2, 11-24-2.2, 11-24-2.3 (public accommodations) (2005); Vt. Stat. Ann. tit. 21, §§ 495, 495a-h & tit. 3, § 963 (employment); tit. 9, §§ 4501, 4502 (public accommodations); tit. 9, § 4503 (housing); tit. 8, § 10403 (credit); tit. 8, § 4724 (insurance) (2004); Wis. Stat. Ann. §§ 106.50(1), 106.50(1m)(t) (definition); 106.52 (public accommodations); 111.31, 111.32, 230.18 (employment); 224.77(1)(o) (credit) (2005).

Nondiscrimination Laws in the U.S.," *available at* http://www.thetaskforce.org/downloads/nondiscriminationmap.pdf. More than three hundred local governments in 42 states also prohibit discrimination on the basis of sexual orientation by legislative action or executive order. *See* "States, Cities and Counties with Civil Rights Ordinances, Policies or Proclamations Prohibiting Discrimination on the Basis of Sexual Orientation," *available at* http://www.thetaskforce.org/downloads/FAIRAmicus-LocalLawsTable.pdf; *see also* Suffredini, *supra* (discussing growth of state and local laws). In addition, private companies are continuing to adopt nondiscrimination policies that include sexual orientation. For example, over 400 of the Fortune 500 companies now prohibit discrimination on the basis of sexual orientation. *See* The Human Rights Campaign, "Employers with Non-Discrimination Policies that Include Sexual Orientation: Private Sector Companies," *available at* http://www.hrc. org/worklife/ndsosearch (follow "Fortune 500 Companies (414)" hyperlink). It is estimated that a majority of American workers are now employed in jurisdictions where they are protected by law from sexual orientation discrimination, *see* Arthur S. Leonard, *Twenty-First Annual Carl Warns Labour & Employment Institute: Sexual Minority Rights in the Workplace*, 43 Brandeis L.J. 145, 149 (2004-2005), although the other half of the population of the United States – over 156 million people – remains vulnerable to being fired, denied benefits, or subjected to other forms of discrimination on the basis of sexual orientation, Suffredini, *supra*.

The recent surge in nondiscrimination laws illustrates the vigorous nature of the debate over sexual orientation taking place in the United States today. This surge also has a reinforcing effect that is unique to the problems

confronting LGBT individuals in the legal profession and that bears directly on the role associations play in fostering meaningful public debate. Specifically, the more widespread nondiscrimination laws and policies become, the more LGBT people will consider the norm sufficiently widespread to feel comfortable coming out of the closet. However, measures like the Solomon Amendment, which seek to compel conformity with the government's values, undermine this reinforcing effect and, in the process, curtail the robust public dialogue that is necessary for society to reach a genuine consensus on this issue.

In this context, the law schools' stance on sexual orientation discrimination, and how the schools treat the military, which openly engages in such discrimination, is very significant. The military is not just another employer, as the government suggests. Brief for the Petitioners at 21. It is the nation's largest employer, with over two million workers, DoD 101: An Introductory Overview of the Department of Defense, *available at* http://www.defenselink.mil/pubs/dod101/dod101for2002.pdf, including 700,000 civilians in over 700 occupations, Department of Defense Jobweb Overview, *at* http://www.jobweb.com/employer/matrix/dod.htm. Indeed, the military describes itself as the oldest, largest, busiest, and most successful company in the United States, and says it employs more people and has a larger budget and greater revenue than Wal-Mart, ExxonMobil, or Ford. *See* DoD 101: An Introductory Overview of the Department of Defense, *supra*.

The military's employment policies have a powerful influence on the country. For example, the decision by President Truman to integrate the military over a half-century ago not only quickly led to the racial integration of military units, *see* The Truman Administration and the

Desegregation of the Armed Forces: A Chronology, *at* http://www.trumanlibrary.org/deseg1.htm, but also dramatically influenced public attitudes at the time, *see, e.g.*, Michael Barone, *Our Country: The Shaping of America from Roosevelt to Reagan* 272 (1990). The desegregation of the military helped pave the way for the acceptance of the principles of racial integration and racial equality across American society. *See, e.g.*, Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499, 522 (1991); *see also* Justice Ruth B. Ginsburg, *Remark:* Brown v. Board of Education *Half a Century Later: The Comparative Perspective:* Brown v. Board of Education *in International Context, October 21, 2004*, 36 Colum. Human Rights L. Rev. 493, 493-94 (2004) (describing influence of military's experience with racial integration in setting stage for Court's landmark decision in *Brown v. Board of Education*). The racial integration of the armed forces was intended to send a message which the military felt was very important at the time. Ginsburg, *supra*, at 493 (describing how military recognized importance of integration for America's "prestige, power and future security") (internal quotation marks and citation omitted). By the same token, the military's current message about sexual orientation is one of discrimination and exclusion, not equality and integration, but it is still an influential one, and one which the law schools, through the even-handed application of their nondiscrimination policies, have a right to resist.

Yet, even if the military were just like any other employer, law schools would have the same associational interest in enforcing their nondiscrimination policies against it. Under the Solomon Amendment, law schools face crippling punishment for denying the military access

to their campuses and students even though the military flouts the schools' written policies by discriminating on the basis of sexual orientation. This chills the ability of law schools to clearly and effectively express their message to their students, the legal profession, and society at large.

In sum, law schools are engaging in highly expressive activity that reflects their deepest values and their sense of their mission as educational institutions. The schools' nondiscrimination policies send a message to the law students on their campuses and to the world outside that discriminating on the basis of sexual orientation or assisting those who do so is wrong and should not be tolerated in the legal profession or society generally. Their decision to weigh in on one of the most hotly-contested debates of this generation is not academic nonsense and is critically important to the efforts of *amici* and many others to reach a national consensus in support of the principle of nondiscrimination and equal opportunity for all people regardless of sexual orientation. The government's suggestion that the Solomon Amendment does not implicate the First Amendment right of association is wrong and threatens to strip that right of its fundamental meaning and purpose. *Amici* respectfully submit that law schools have a First Amendment right to enforce their nondiscrimination policies even-handedly and free of government interference that prevents them from expressing their message to students, employers, and the public in an effective and meaningful way.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the decision of the court of appeals.

Respectfully submitted,

JONATHAN L. HAFETZ
Counsel of Record
LAWRENCE S. LUSTBERG
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE, P.C.
One Pennsylvania Plaza, 37th Fl.
New York, NY 10119
(212) 649-4700